McKENNETT STENEHJEM REIERSON FORSBERG & HERMANSON, P.C.
ATTORNEYS AND COUNSELORS AT LAW

RICHARD A. McKENNETT
KENT REIERSON**
DAVID T. HERMANSON*

*ALSO ADMITTED IN MONTANA
**CERTIFIED CIVIL TRIAL SPECIALIST

314 1ST AVENUE EAST
P.O. BOX 1366
WILLISTON, NORTH DAKOTA 58802-1366
PHONE (701) 577-6771 / FAX (701) 577-2163

MARK L. STENEHJEM*
LAUREL J. FORSBERG*
VALESKA A. HERMANSON*

TAMMY LaCROSSE, PARALEGAL

BRANCH OFFICE LOCATED IN WATFORD CITY, ND

January 4, 2006

Hon. Dale V. Sandstrom
Supreme Court Justice
State Capital
600 E. Boulevard Ave
Bismarck ND 58505-0530

Re: Joint Procedure Committee
Suggestion for changes to Court Rules

Dear Justice Sandstrom:

I am writing to suggest two changes to the Court Rules. The first would be an addition to the Rules of Court which would create a special summons in custody cases, requiring that neither party remove the minor children from North Dakota without written consent of the other party or order of the Court. I have attached a proposed addition to North Dakota Rules of Court 8.4 for the Joint Procedure Committee's consideration.

This provision is already included in the divorce summons at North Dakota Rules of Court 8.4(a)(4). However, in custody cases where the parties are not married, there is no requirement that the parties remain in the state with the children while the action is pending. Therefore, in cases where moving is an issue, I have had to obtain Interim Orders to keep the parties in the state.

I believe this provision in the divorce summons is reasonable and necessary in order for the North Dakota courts to exercise jurisdiction over the custody issues involving minor children. Additionally, while under the UCCJA North Dakota courts would retain jurisdiction if the children were removed from the state, the logistics of actually getting a party to return the children would create difficulties sufficient to justify such a rule. The same reasons that justify such a rule in divorce cases would justify such a rule in non-divorce custody cases.

The second change I suggest is the adoption of a rule requiring a party presenting affidavits in a Motion relating to a divorce or custody matter to make the affiant available for cross-examination at a hearing on that matter. This would be similar to the

rule on Interim Motions, North Dakota Rules of Court 8.2 (e)(2). I have attached a proposed change to North Dakota Rules of Court 3.2 for the Joint Procedure Committee's consideration.

The general rules relating to Motions, North Dakota Rules of Civil Procedure, Rule 7(b) and North Dakota Rule of Court 3.2, do not require the party to make an affiant available for cross examination. In matters such as a motion for Summary Judgment or a Motion in Limine, cross examination is not necessary to the motion. However, motions in divorces and custody cases generally relate to issues of property or custody or contempt and generally require an evidentiary hearing. In such cases, one party should not be allowed to present an affidavit without making the affiant available for cross-examination at the hearing.

There are several reasons I believe this would be justified. First, the hearings on these matters are usually scheduled within 30 days or less. This leaves little time for the other party to schedule a deposition in order to cross examine the affiant. Secondly, it should not be the other party's responsibility to incur the cost of deposing the affiant or subpoening them to court in order to cross-examine that affiant. The party presenting the affidavit intended the affidavit to replace in-court testimony in support of their case and therefore should assume the costs of presenting the testimony.

Most important, without such a rule, I forsee some very unfair misuse of affidavits. For example, an attorney could submit an affidavit from a person residing in New York in support of their client's position. Since the responding party can't subpoena the affiant in New York to the court in North Dakota, he/she must depose the affiant if they want to cross-examine the affiant. Therefore, the party presenting the affiant has now forced the responding party to incur the cost of taking a deposition in New York, or forgo the opportunity to cross examine that affiant. This causes an undue burden on the responding party in order to cross-examine the testimony presented by the moving party, and an unfair advantage to the moving party. As noted before, if a party wishes to present testimony, in fairness they should be responsible for the costs associated with presenting the testimony in a manner which allows the other party to cross-examine the witness so the Court has an opportunity to determine the facts of the case.

Lastly, I believe such a rule would conform with quite a few attorney's understanding of the manner of presenting affidavits in divorce or custody matters. It was mine until recently and, in a hearing last week, a veteran attorney made the same mistake.

Thank you and the Joint Procedure Committee for considering my suggestions. If anyone has questions, I would be happy to discuss them.

Sincerely,

Valeska A. Hermanson\

enc: Rule 8.4 with suggested changes
Rule 3.2 with suggested changes

RULE 8.4 SUMMONS IN ACTION FOR DIVORCE, ~~OR~~ SEPARATION OR CUSTODY

(a) Restraining Provisions-Divorce or Separation. A summons in a divorce or separation action must be issued by the clerk under the seal of the court, or by an attorney for a party to the action, and include the following restraining provisions:

(1) Neither spouse shall dispose of, sell, encumber, or otherwise dissipate any of the parties' assets, except:

a. For necessities of life or for the necessary generation of income or preservation of assets; or

b. For retaining counsel to carry on or to contest the proceeding;

If a spouse disposes of, sells, encumbers, or otherwise dissipates assets during the interim period, that spouse shall provide to the other spouse an accounting within 30 days.

(2) Neither spouse shall harass the other spouse.

(3) All currently available insurance coverage must be maintained and continued without change in coverage or beneficiary designation.

(4) Neither spouse shall remove any of their minor children from North Dakota without the written consent of the other spouse or order of the court except for temporary periods.

(5) Each summons must include the following statement in bold print.

IF EITHER SPOUSE VIOLATES ANY OF THESE PROVISIONS, THAT SPOUSE MAY BE IN CONTEMPT OF COURT.

(b) Restraining Provisions-Custody. A summons in a custody action must be issued by the clerk under the seal of the court, or by an attorney for a party to the action, and include the following restraining provisions:

(1) Neither party shall remove any of their minor children from North Dakota without the written consent of the other party or order of the court except for temporary periods.

(2) Each summons must include the following statement in bold print.

IF EITHER PARTY VIOLATES ANY OF THESE PROVISIONS, THAT PARTY MAY BE IN CONTEMPT OF COURT.

(c) Applicability of Restraining Provisions. The restraining provisions contained in the summons apply to both ~~spouses~~ parties upon service of the summons. The provisions are effective until otherwise provided by court order or by written stipulation of the parties filed with the court.

RULE 3.2 MOTIONS

(a) Submission of Motion. Notice must be served and filed with a motion. The notice must indicate the time of oral argument, or that the motion will be decided on briefs unless oral argument is timely requested. Upon serving and filing a motion, the moving party shall serve and file a brief and other supporting papers and the adverse party shall have 10 days after service of a brief within which to serve and file an answer brief and other supporting papers. The moving party may serve and file a reply brief within 5 days after service of the answer brief. Upon the filing of briefs, or upon expiration of the time for filing, the motion is deemed submitted to the court unless counsel for any party requests oral argument on the motion. If any party who has timely served and filed a brief requests oral argument, the request must be granted. A timely request for oral argument must be granted even if the movant has previously served notice indicating that the motion is to be decided on briefs. The party requesting oral argument shall secure a time for the argument and serve notice upon all other parties. The court may hear oral argument on any motion by telephonic conference. The court may require oral argument and may allow or require testimony on the motion. Requests for oral argument or the taking of testimony must be made not later than 5 days after expiration of the time for filing the answer brief.

(b) Submission of affidavits in domestic relations and custody cases. When an evidentiary hearing is held concerning a motion filed by a party in a domestic relations or custody case, evidence presented by affidavit may not be considered unless, at the time of the evidentiary hearing, the party offering the affidavit makes the affiant available for cross examination.

~~(b)~~ (c) **Failure to File Briefs.** Failure to file a brief by the moving party may be deemed an admission that, in the opinion of party or counsel, the motion is without merit. Failure to file a brief by the adverse party may be deemed an admission that, in the opinion of party or counsel, the motion is meritorious. Even if an answer brief is not filed, the moving party must still demonstrate to the court that it is entitled to the relief requested.

~~(c)~~ (d) **Extension of Time.**Extensions of time for filing briefs and other supporting papers, or for continuance of the hearing on a motion, may be granted only by written order of court.All requests for extension of time or continuance, whether written or oral, must be accompanied by an appropriate order form.

~~(d)~~ (e) **Time Limit for Filing Motion.** Except for good cause shown, a motion must be filed in such time that it may be heard not later than the date set for pretrial of the case.

~~(e)~~ (f) **Application of Rule.** This rule does not apply to the extent it conflicts with another rule adopted by the Supreme Court.